

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORNA R. PEARCE,

Plaintiff,

v.

COULEE CITY, et al.,

Defendants.

NO: 11-CV-0030-TOR

ORDER GRANTING MOTION FOR
PROTECTIVE ORDER

BEFORE THE COURT is Defendants' Motion for Protective Order (ECF No. 19). This matter was heard without oral argument on August 24, 2012. The court has reviewed the motion, the response, and the reply, and the record and files herein, and is fully informed. The court finds that oral argument on the motion is unnecessary. Accordingly, the telephonic hearing currently scheduled for August 31, 2012 at 1:30 p.m. is hereby stricken pursuant to LR 7.1(h)(3)(b)(iv).

FACTS

Plaintiff Lorna Pearce sued the Town of Coulee City and its Mayor, Richard Heiberg, for wrongful termination of her former employment as the Coulee City

1 Clerk. Shortly after filing her lawsuit, Plaintiff propounded several discovery
2 requests to Defendants. One of these requests sought copies of email messages
3 authored or received by Plaintiff and/or Richard Heiberg and which contained one
4 of several enumerated keywords. *See* ECF No. 21-1.

5 Defendants subsequently produced over 7,000 documents in response to this
6 request on April 26, 2012. An additional 800 documents were withheld as
7 privileged. On June 28, 2012, while defending a deposition of Defendant Heiberg,
8 defense counsel discovered that two emails which contained confidential attorney-
9 client communications had been inadvertently disclosed to Plaintiff. Defendants
10 promptly sought return of the emails in a letter to Plaintiff's counsel dated July 3,
11 2012. Plaintiff refused to return the subject emails. This motion follows.

12 DISCUSSION

13 **A. The Emails Are Privileged**

14 “The attorney-client privilege protects confidential communications between
15 attorneys and clients, which are made for the purpose of giving legal advice.”
16 *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). The privilege exists
17 where “(1) legal advice of any kind is sought (2) from a professional legal adviser
18 in his capacity as such, (3) the communications relating to that purpose, (4) made
19 in confidence (5) by the client, (6) are at his instance permanently protected (7)
20 from disclosure by himself or by the legal adviser, (8) unless the protection be

1 waived.” *Id.* (internal quotation and citation omitted). The attorney-client
2 privilege extends to confidential communications between employees of a
3 corporation and the corporation’s attorney, *United States v. Graf*, 610 F.3d 1148,
4 1158 (9th Cir. 2010), as well as to confidential communications among corporate
5 employees relating to legal advice obtained from the corporation’s attorney. *See*
6 *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980)
7 (“When the client is by nature a group . . . the courts have agreed that the privilege
8 should not be defeated by some limited circulation beyond the attorney and the
9 person within the group who requested the advice.”); *In re Teleglobe*
10 *Communications Corp.*, 493 F.3d 345, 369 (3d Cir. 2007) (“[C]ourts almost
11 universally hold that intra-group information sharing does not implicate the
12 disclosure rule.”); *see also Admiral Ins. Co. v. U.S. Dist. Court for the Dist. of*
13 *Arizona*, 881 F.2d 1486, 1492 (9th Cir. 1989) (“[T]he privilege applies to
14 communications by any corporate employee regardless of position when the
15 communications concern matters within the scope of the employee’s corporate
16 duties and the employee is aware that the information is being furnished to enable
17 the attorney to provide legal advice to the corporation”) (citing *Upjohn Co. v.*
18 *United States*, 449 U.S. 383, 394 (1981)).

19 Here, the two emails in question are clearly privileged. Attached to the first
20 email is an eleven-page memorandum written by Defendant Heiberg and addressed

1 directly to the City's retained counsel. This memorandum contains a detailed
2 "synopsis" of the events which preceded Plaintiff's termination, along with
3 editorial comments by Defendant Heiberg concerning the City's reasons for
4 terminating Plaintiff. There can be no question that this document is privileged.

5 The email from Defendant Heiberg to Coulee City Clerk Alta Paulsson is
6 similarly privileged. In this email, Defendant Heiberg asks Ms. Paulsson for
7 information concerning individuals on Defendants' witness list which was
8 specifically requested by the City's retained counsel. He also relays the substance
9 of a comment made by counsel concerning legal strategy. Here again, there can be
10 no question that this document is privileged.

11 **B. Defendants Have Not Waived the Privilege**

12 Having determined that both emails are protected by the attorney-client
13 privilege, the court must now address whether Defendants waived the privilege.
14 Plaintiff contends that Defendants waived any claim of privilege to the
15 communications by (1) disclosing them to Plaintiff's counsel during discovery; (2)
16 sharing them with a third party; and (3) releasing them into the public domain by
17 filing them in conjunction with the instant motion.

18 As a general rule, "[v]oluntary disclosure of privileged communications
19 constitutes waiver of the privilege." *Richey*, 632 F.3d at 566. This rule is subject
20 to one important qualification, however: a voluntary disclosure does not result in

1 waiver if “(1) the disclosure is *inadvertent*; (2) the holder of the privilege took
2 reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable
3 steps to rectify the error, including (if applicable) following Federal Rule of Civil
4 Procedure 26(b)(5)(B).” Fed. R. Evid. 502(b) (emphasis added). In other words,
5 “inadvertent disclosure of protected communications or information . . . does not
6 constitute a waiver if the holder took reasonable steps to prevent disclosure and
7 also promptly took reasonable steps to rectify the error.” Advisory Committee
8 Note to Fed. R. Evid. 502(b).

9 Here, there is no dispute that Defendants disclosed the subject emails to
10 Plaintiff inadvertently in discovery. Similarly, Plaintiff has not contested the
11 reasonableness of Defendants’ approach to guarding against inadvertent disclosure
12 in discovery (*i.e.*, having one attorney perform an initial privilege screening and a
13 second attorney perform a privilege cross-check). Finally, there is no dispute that
14 Defendants acted promptly to rectify the inadvertent disclosure after discovering it
15 during Defendant Heiberg’s deposition. Accordingly, Defendants did not waive
16 the attorney client privilege by inadvertently disclosing the two emails to Plaintiff
17 in discovery.

18 Next, Plaintiff contends that Defendant Heiberg waived the attorney-client
19 privilege by disclosing the substance of the confidential communications with
20 counsel to a third party. This argument fails because the person to whom the

1 disclosure was made, Coulee City Clerk Alta Paulsson, does not qualify as a third
2 party. Because Ms. Paulsson is also an employee of Defendant Coulee City,
3 Defendant Heiberg did not waive the attorney-client privilege by disclosing to her
4 the substance of his communications with defense counsel. *See Coastal States Gas*
5 *Corp.*, 617 F.2d at 863; *In re Teleglobe Communications Corp.*, 493 F.3d at 369.

6 Finally, Plaintiff argues that Defendants waived their claim to privilege by
7 filing the subject emails in conjunction with the instant motion, which caused them
8 to become publicly available on the Public Access to Court Electronic Records
9 (“PACER”) website. While it would have been preferable for Defendants to have
10 filed the emails under seal or submitted them separately for *in camera* review, the
11 court will not penalize Defendants for attempting in good faith to support their
12 motion with the very documents at issue. Accordingly, the court will entertain a
13 *nunc pro tunc* motion by Defendants to seal ECF Nos. 20-1 and 20-2 such that the
14 documents will be accessible to the court and defense counsel only. This motion
15 shall be filed by Friday, September 7, 2012 at 5:00 p.m.

16 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 17 1. Defendants’ Motion for Protective Order (ECF No. 19) is **GRANTED**.
- 18 2. The telephonic hearing on Defendants’ motion currently scheduled for
19 August 31, 2012 at 1:30 p.m. is **STRICKEN**.

- 1 3. Defendants shall file a *nunc pro tunc* motion to seal ECF Nos. 20-1 and
2 20-2, such that the documents will be accessible to the court and defense
3 counsel only, by **Friday, September 7, 2012 at 5:00 p.m.**
- 4 4. The two (2) protected emails inadvertently produced by Defendants in
5 response to discovery requests from Plaintiff, shall be subject to this
6 Protective Order as follows: Plaintiff shall return the two (2) protected
7 emails in question to Defendants, and shall not use, copy, or
8 disseminate the protected emails in any way. Plaintiff shall also destroy
9 any copies made of the inadvertently produced protected emails.
- 10 5. The court hereby enters a “claw back” provision to protect against the
11 inadvertent production of any privileged information, confidential
12 information, restricted information, and/or work product materials of
13 any and all documents, electronic information, or hard copy data. The
14 inadvertent production of any privileged information, confidential
15 information, restricted information, and/or work product materials does
16 not constitute a waiver of privilege or prevent any party from asserting
17 privilege or protective nature of the document or information.
- 18 6. If any party inadvertently produces privileged information, confidential
19 information, restricted information, and/or work product materials, the
20 producing party shall make a good-faith representation that the

1 production was inadvertent. The receiving party shall not make any use
2 of the contested material. Any party receiving privileged information,
3 confidential information, restricted information, and/or work product
4 materials shall return it upon request of the producing party. When
5 receiving the request to return privileged information, confidential
6 information, restricted information, and/or work product materials, the
7 receiving party shall return them within five (5) business days, regardless
8 of if the receiving party agrees with the privilege claim. This Order is
9 governed by Federal Rule of Evidence 502 and is entered pursuant to
10 Federal Rule of Civil Procedure 26(c)(1).

11 The District Court Executive is hereby directed to enter this Order and
12 provide copies to counsel.

13 **DATED** this 24th day of August, 2012.

14 *s/ Thomas O. Rice*

15 THOMAS O. RICE
16 United States District Judge
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